IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1270

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

vs.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., *et al.*,

Respondents.

Brief of 14 Named States as Amici Curiae in Support of Respondents

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Introduction

The Environmental Protection Agency has succinctly stated the nature of the radioactive water pollution problem presented in this case:

> ". . . A number of long-lived radionuclides are now discharged [into the nation's waters] from various fuel cycle operations which carry a potential for build-up of environmental levels and irreversible commitments for exposure of populations that may persist for tens, hundreds, or thousands of years. . . ." EPA, *Proposed Standards for Environmental Radiation Protection for Nuclear Power Operation*, 40 Fed. Reg. 23419, — (May 29, 1975).

The question very simply put is who has regulatory control over the discharge of radioactive pollutants into the nation's waters. Is it EPA, as the express language of the Federal Water Pollution Control Act (FWPCA) of 1972 provides? Or is it the Nuclear Regulatory Commission (NRC, formerly AEC) as contended by the petitioners? Amici curiae believe that the 10th Circuit Court of Appeals correctly decided this case by holding that EPA has such regulatory authority. *Colorado Public Interest Research Group, Inc. v. Train,* 507 F.2d 743 (10th Cir. 1974).

In 1946, the Atomic Energy Act presented the only conceivable statutory authority for the regulation of radioactive emissions into water. From the Act's inception there was a question as to the full extent of such authority. The beginning of the resolution of the problem was presented in 1970 with Reorganization Plans numbers 3 and 4 in connection with the enactment of national environmental legislation (42 U.S.C.A. §§ 4321 *et seq.*). These Reorganization Plans transferred several functions of the Atomic Energy Commission to the Environmental Protection Agency. In particular, the duty to establish "generally applicable environmental standards for the protection of the general environment from radioactive material" (Reorganization Plan No. 3 of 1970, 35 F.R. 15623, 84 Stat. 2086) and the responsibility "for establishing . . . emission limits for radioactivity . . ." (Reorganization Plan No. 4 of 1970, 35 F.R. 15627, 84 Stat. 2090) were transferred to the EPA. Under these plans the AEC retained "responsibil-

ity for the *implementation and enforcement* of radiation standards through its *licensing* authority." *Id.* (Emphasis added.)

According to Reorganization Plan No. 4, not only was the authority to set generally applicable standards to be transferred to the EPA, but also, the AEC's authority to set specific standards in accordance with such general standards was transferred.

> "The Atomic Energy Commission is now responsible for establishing environmental radiation standards and emission limits for radioactivity. Those standards have been based largely on broad guidelines recommended by the Federal Radiation Council. The Atomic Energy Commission's authority to set standards for the protection of the general environment from radioactive material would be transferred to the Environmental Protection Agency. The functions of the Federal Radiation Council would also be transferred. AEC would retain responsibility for the implementation and enforcement of radiation standards through its licensing authority." Reorganization Plan No. 4 of 1970, 35 F.R. 15627, 84 Stat. 2090.

Thereafter, some question lingered as to the dividing line between the establishment of standards by the EPA and the implementation by the AEC. The uncertainty was resolved by Congress in the FWPCA of 1972 through the express reaffirmation of the EPA's regulatory authority over radioactive pollutants discharged into the waters of the United States. 33 U.S.C.A. §§ 1251, 1362.

Statement of Interest of Amici Curiae

The relative roles to be played by the NRC and the EPA in regulating the discharge of liquid radioactive wastes is an important concern to amici curiae. Amici believe that the protection of the health and safety of the people of this nation requires a clean environment, including the goal of water free from radioactive pollution; amici believe that the EPA is the federal agency best able to determine proper effluent standards with a view toward this goal. EPA expertise in pollution matters and its lack of any responsibility to promote the nuclear industry best permit an objective examination of radioactive discharges under the FWPCA.

The health and safety of their citizens is a traditional concern of the states, and the hazards of radioactive materials have long been of particular concern. When private industrial utilization of nuclear energy was made possible by the Atomic Energy Act of 1954, however, the role in safety and health regulation that remained to the states was left unclear. An amendment to that Act in 1959 addressed the states' role, but uncertainties still remained. Finally, when the state of Minnesota attempted to apply radioactive effluent regulations to a federally licensed nuclear industry facility, the courts held that the 1959 Amendment had been intended to preclude such state radiation regulations, except pursuant to formal agreements with the Atomic Energy Commission (AEC) as authorized by that amendment. *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* without opinion (two Justices dissenting), 405 U.S. 1035 (1972).

Subsequent to the *Northern States Power* decision, Congress addressed the problem of water pollution by radioactive materials (as well as other types of water pollution) by enacting the Federal Water Pollution Control Act Amendments of 1972 (FWPCA). 33 U.S.C.A. § 1251, *et seq*. The FWPCA affords to the states a major role in imposing and enforcing environmental health and safety regulations concerning water pollutants with the approval of the Administrator of the Environmental Protection Agency. Thus, the inclusion of radioactive materials in the FWPCA's definition of "pollutant" has important ramifications for states wishing to participate in protecting their citizens and environment against radiation pollution. In other words, to the extent that radioactive materials are embraced within the FWPCA, the states may now participate in the regulation of radioactive materials discharged into their waters.

Summary of Argument

The Federal Water Pollution Control Act, as amended in 1972, was specifically enacted to protect the nation's waters from pollution of every kind. The Administrator of the EPA has the duty to carry out this Act and is encouraged to seek state cooperation in achieving this end. This single major purpose of the FWPCA serves as an assurance that environmental problems will receive priority consideration in water quality evaluation, as clearly intended by Congress.

The Atomic Energy Act, on the other hand, was enacted in order to stimulate the growth of the nuclear industry. The concern for public health and safety expressed in the Act is in reference to nuclear explosions, over-exposure of individuals to radioactive materials,

and problems of theft and sabotage. The Act is not specifically concerned with the long-term accumulation of noncritical amounts of radioactive emissions in the enviroment and the effects thereof.

Enacted to serve completely distinct functions, the two acts involve only a coincidental overlap in the regulation of radioactive effluents. Congressional will, as expressed in the 1972 amendments to the FWPCA, indicates a strong desire to clean our national waters. All previous legislative enactments must and can be interpreted so as to fulfill this desire.

The plain meaning of the word "pollutant" as used in the FWPCA was correctly interpreted by the 10th Circuit to include byproduct, source, and special nuclear materials. Congress' failure to specifically exclude these materials, in light of other specific exclusions in the Act, should preclude any other conclusion. Even more persuasive of congressional intent is the fact that the inclusiveness of the term "pollutant" is discussed numerous times in the legislative history of the FWPCA, yet no attempt was made to incorporate the exclusions proposed by petitioners. The legislative history of the Act is ambiguous and is not a reliable indicator of congressional intent. Thus, the clear wording of the Act and its impressive objective, mandate a finding that by-product, source, and special nuclear materials are to be regulated by the EPA under the FWPCA.

ARGUMENT

I

The 10th Circuit Correctly Interpreted the Plain Meaning of the Federal Water Pollution Control Act in Holding That the Act Governs Pollution From Byproduct, Source and Special Nuclear Materials

A. The Definition of Pollutant Is Clear and Unambiguous

Congress carefully defined the terms used in the FWPCA (33 U.S.C.A. §1362). As petitioners point out, a great deal of legislative history discusses the inclusiveness of the term "pollutant" as used in the Act. The term is precisely defined in 33 U.S.C.A. section 1362(b):

> "The term 'pollutant' means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive* materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." (Emphasis added.)

In fact, the definition is the most lengthy of all those contained in the Act. Had Congress intended to exclude byproduct, source, and special nuclear materials from the operation of the Act, this would have been the obvious place to do so. In light of the numerous discussions on this matter, it cannot be said that the failure to specifically exclude these materials is a result of congressional oversight. The plain meaning rule (*United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961)) is particularly applicable in this case.

B. Legislative History Is Not a Reliable Indicator of Congressional Intent in This Case

Petitioners rely primarily upon certain excerpts from the legislaive history of the FWPCA in making the argument that byproduct, source, and special nuclear materials are not included in the Act's definition of "pollutant." Respondents cite other excerpts from the legislative history which lead to the opposite conclusion. In particular, the comments of Senator Muskie, one of the Act's authors, are convincing as to EPA authority over these debated materials (Committee Print, "A Legislative History of the Water Pollution Control Act Amendments of 1972 Together with a Section-by-Section Index," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (1973); 1 Leg. Hist. 161, 198):

". . . [T]he Senator is asking whether EPA, in its authority to set effluent limitations controls with respect to the subject matter which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes.

". . . .

". . . We considered that this kind of authority should be in EPA and not in AEC, and in order to put the authority there, we put it in this act, and that is where it is.

". . . .

". . . The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment. It did not occur to us

that AEC might be more conscientious in this respect than EPA, so we have given EPA the total authority on the assumption that the risk from AEC was not of the nature described by the Senator but, rather, the opposite, as history demonstrates."

This background provides ample reason for this Court to refuse to rely upon the legislative history for the determination of congressional intent behind this statute.[1]

II

The AEA and the FWPCA Were Enacted for Entirely Different Purposes

A. The Atomic Energy Act Was Enacted to Promote Growth of Nuclear Power for Peaceful Purposes

Throughout the Atomic Energy Act of 1946 (42 U.S.C.A. § 2011, *et seq.*) the intention to promote the growth of nuclear power is clearly dominant. Section 2012, the congressional findings, repeatedly refers to *production* and *utilization* of source, byproduct, and special nuclear materials and the *operation* of nuclear facilities. 42 U.S.C.A. § 2012(c)(d)(e). In its recognition that "[a]tomic energy is capable of application for peaceful as well as military purposes," Congress declared national policy to direct the "*development, use,* and *control* of atomic energy . . . so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." 42 U.S.C.A. §2011(b). (Emphasis added.)

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[1] *See also California v. EPA*, 7 ERC 1667, 1671 (1975) *cert. granted;* and *Alabama v. Seeber*, 502 F.2d 1238, 1246 (5th Cir. 1974).

"It is the purpose of this chapter to effectuate the policies set forth above by providing for—

". . . .

"(c) a program for Government control of the *possession, use,* and *production* of atomic energy and special nuclear material. . . ." 42 U.S.C.A. § 2013. (Emphasis added.)

The government's desire to harness nuclear energy for peaceful purposes is further demonstrated by those sections of the Act which limit liability for nuclear accidents and authorize federal indemnification for the atomic energy industry. (42 U.S.C.A. §§ 2012(i), 2210.) The Act, as a whole, clearly was meant to foster nuclear growth, deeming the general welfare and nuclear energy to go hand in hand.

1. *The AEA Was Not Enacted to Regulate Pollution Caused by the Disposal of Nuclear Wastes*

Section 2021 of the Act, "Cooperation With States," sets forth a procedure whereby the Atomic Energy Commission (AEC) (now the Nuclear Regulatory Commission (NRC)) may enter into an agreement with any state providing for discontinuance of AEC (NRC) regulatory authority with respect to byproduct, source, and special nuclear materials. 42 U.S.C.A. § 2021(b) Subsection (b) states:

"(b) Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V,

VI, and VII of this chapter, and section 2021 of this title, with respect to any one or more of the following materials within the State—

"(1) byproduct materials;

"(2) source materials;

"(3) special nuclear materials in quantities not sufficient to form a critical mass.

"During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards."

The AEA gives only passing concern to the problem of disposal of nuclear wastes. In only one section of this lengthy legislation is the issue of disposal mentioned. Subsection (c) states:

"(c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

"(1) the construction and operation of any production or utilization facility;

"(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

"(3) the *disposal* into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

"(4) the *disposal* of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission." (Emphasis added.)

This passing reference to disposal of nuclear materials is interesting in that this is the sole reference to disposal in the entire Act, clearly indicating that this was not a major concern of Congress in enacting this legislation.

The Atomic Energy Act as amended in 1954, 1959, 1970, and by the Energy Reorganization Act of 1974 (P.L. 93-438), adds nothing further in regard to disposal of nuclear wastes. The Nuclear Regulatory Commission (NRC) has assumed the AEC's duties in regard to nuclear licensing, but the basic regulatory duties are unchanged.

2. *The Problems of Waste Disposal Recognized in the Atomic Energy Act Are Not the Same Problems Sought To Be Cured by the Federal Water Pollution Control Act*

Enacted shortly following the first uses of the atom bomb at Hiroshima and Nagasaki, the Atomic Energy Act of 1946 displays a recognition of the fearful magnitude of atomic power. Although those bombings taught the potential health hazards of using nuclear energy, their primary lesson was the massive destruction which could be wrought through the non-peaceful use of nuclear power. The safeguards of the Atomic Energy Act are directed at the possibilities of a major nuclear

catastrophe by theft, sabotage or mishap. Protection of public health from radiation hazards is discussed several times, but in a context which implies a connection to such a catastrophe as mentioned above. For example, public protection against "nuclear incidents" is one goal of the Atomic Energy Act. As defined by 42 U.S.C.A. section 2014(q), the term "nuclear incident" means:

". . . any occurrence, including an extraordinary nuclear occurrence [42 U.S.C.A. § 2014(j)] . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. . . ."

From this definition it can be seen that the gradual accumulation of radioactive material in the environment over a period of several decades would most likely not be classified as a "nuclear incident." Yet, this slow deterioration of the environment caused by radioactive pollution over an extended period may seriously endanger human life. The Atomic Energy Act does not seem to be geared toward safeguarding against such a protracted process.

Serious criticism has been directed toward the AEC's role in protecting public health and safety:

"In other areas, such as food and drug regulation, for example, products may not be used until their safety has been adequately demonstrated; in the radiation area, however, the reverse is true, since the approach is to permit exposures to radiation until adverse effects have been demonstrat-

ed." *Federal Environmental Law* (ed. Dolgin and Guilbert), Environmental Law Institute, West (1974) at 1029.

On May 29, 1975, the EPA issued its Proposed Standards for Environmental Radiation Protection for Nuclear Power Operation, 40 F.R. 23419 [40 C.F.R. Part 190]. The narrow scope of protection of "public health and safety" previously afforded by the AEC is demonstrated by the comments accompanying the proposed standards.

> "Radiological protection of the public from nuclear power industry operations has been based to date on guidance which has had as its primary focus the general limitation of dose to the most exposed individual, rather than limitation of the total population dose from any specific type of activity. The proposed expanded development of the nuclear power industry requires, however, the use of a broader environmental perspective that more specifically considers the potential radiological impact on human population of radioactive effluents from the industry; rather than just that on the most exposed individual. A number of long-lived radionuclides are now discharged from various fuel cycle operations which carry a potential for build-up of environmental levels and irreversible commitments for exposure of populations that may persist for tens, hundreds, or thousands of years."
>
> ". . . .
>
> "Protection of the public from the environmental accumulation of long-lived radioactive materials may require some changes in regulatory requirements."

The Federal Water Pollution Control Act as amended in 1972 is specifically aimed at restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters. . . . (1) [I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985; . . ." 33 U.S.C.A. § 1251. The FWPCA's purpose, environmental integrity of our navigable waters, is entirely different from that of the Atomic Energy Act. (See Argument II C. 1 for further discussion of the FWPCA.)

B. The Federal Water Pollution Control Act Impliedly Amended the Atomic Energy Act

Petitioners claim that

> "[p]rior to the decision below, the Atomic Energy Commission . . . exercised exclusive authority to regulate radioactive effluents released from NRC-licensed electrical power plants and from government research and production facilities operated by contractors for ERDA." (Brief for the Petitioners, No. 74-1270, p. 19.)

It is interesting to note that petitioners used the word "exercised" in regard to the Commission's alleged exclusive authority. Nowhere in the Atomic Energy Act is such exclusive authority expressly granted. Section 2021 of the Atomic Energy Act expresses a contrary position in setting out a plan for cooperation between the AEC and the states. As discussed *supra*, this section provides the authority for state regulation of certain effluents from byproduct, source, and special nuclear materials.

As also mentioned *supra*, the Atomic Energy Act, both in its original form and as amended, deals only minimally with disposal of noncritical amounts of nu-

clear waste. Petitioners' statement that source, byproduct, and special nuclear materials are ". . . already regulated *comprehensively* by the NRC *pursuant to the Atomic Energy Act*" is misleading. (Brief for the Petitioners 74-1270, p. 33.) (Emphasis added.) Any program currently imposed by the NRC for the licensing of radioactive effluents is of a voluntary nature; nothing in the Atomic Energy Act forces the NRC to regulate ordinary, noncritical emissions.[2] Regulation by the EPA under the FWPCA, on the other hand, is mandatory for any pollutant entering our nation's waters. 33 U.S.C.A. §§ 1251, 1252, 1342.

In *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162 (S.D.N.Y. 1973) it was claimed that the Federal Power Act granted exclusive jurisdiction to the Federal Power Commission in the licensing of hydroelectric plants. The court stated:

> ". . . Con Ed points to no Power Act provision that would require the FPC to satisfy literally or even substantially the demands of § 404. On the other hand, § 404 conditions discharge of dredged or fill materials on approval by two federal agencies, granted pursuant to specific guidelines designed to protect the environment. Their approval is mandatory under the 1972 Amendments [to the FWPCA], whereas FPC compliance with § 404 would be merely voluntary. To this extent, the Acts are inconsistent." 370 F.Supp. 170.

A parallel situation is presented by the facts before this court. Although the NRC may have taken upon itself the regulation of ordinary radioactive emissions for environmental protection, it is charged with no such duty.

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[2]As stated in Argument II, *infra*, the statutory language of the AEA refers to *possession*, *use*, and *control*, rather than discharge of materials after use.

One particular historical fact is pertinent in respect to the status of nuclear regulation at the time the amendments to the FWPCA were enacted. In 1972, the Atomic Energy Commission was the regulatory agency implementing the AEA. There was widespread concern for the Commission's failure to adequately regulate the same industry which it had a duty to develop, as evidenced by the comments accompanying the Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233.

> "(C) The Congress finds that it is in the public interest that the licensing and related regulatory functions of the Atomic Energy Commission be separated from the performance of the other functions of the Commission. . . ." P.L. 93-438 Section 2.
>
> "The Energy Reorganization Act of 1974 . . . will consolidate the Federal Government's fragmented and uncoordinated energy research and development functions and, at the same time, *upgrade the regulation* of nuclear power.
>
> ". . . .
>
> "The reorganization established by this legislation has the additional purpose of separating the regulatory functions of the AEC from its developmental and promotional functions—a response to growing criticism that there is a basic conflict between the AEC's regulation of the nuclear power industry and its development and promotion of new technology for the industry.
>
> ". . . .
>
> "Unfortunately, the present Regulatory Division of the AEC, from which nearly all of the new Commission's personnel and functions are drawn, has been weak and undernourished in relation to

> the vast resources of the development side of the AEC." P.L. 93-438, Legislative History, Senate Report No. 93-980. (Emphasis added.)

This concern alone may have been sufficient reason for members of Congress to wish to place another agency in control of radioactive water pollution. Such a conclusion is no more conjecture than petitioners' interpretation of the legislative history of the FWPCA, and, in view of the Act's language, is far more consistent.

In addition to the congressional intent to amend the AEA, it should be noted that the Act itself recognized the possible need for future amendment. Specifically, section 2021, governing cooperation with states, provides:

> "(a) It is the purpose of this section—
>
> ". . . .
>
> "(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable." 42 U.S.C.A § 2021.

The FWPCA provides for a gradual increase in state authority, under the guidance of the EPA Administrator, in regulating pollution into water. This form of state cooperation would appear to correspond with the plan set forth in the Atomic Energy Act. Thus, should this court determine that the AEC (and the NRC) did, at one time, have exclusive jurisdiction to regulate effluents of byproduct, source, and special nuclear materials, it is suggested that this court also find that the FWPCA, as a later expression of congressional will, has impliedly amended that provision. *Ely v. Velde*, 321 F.Supp. 1088 (E.D.Va. 1971).

C. The EPA Is the Federal Agency Most Qualified to Regulate Radioactive Effluents Into Our Nation's Waters

1. *The FWPCA Has as Its Sole Function the Elimination of Water Pollution*

During this decade both federal and local governments have responded to the awakening of environmental consciousness throughout our nation. The time has arrived when it is recognized that all future life is intrinsically tied to the maintenance of an ecological balance in the world in which we live. Navigable waters play a fundamental role in our ecosystem.

The Environmental Protection Agency was established for one purpose—to protect our nation's environment. (Reorganization Plan 3 of 1970, 35 F.R. 15623, 84 Stat. 2086, eff. Dec. 2, 1970. *See also* Reorganization Plan 4 of 1970, 35 F.R. 15627, 84 Stat. 2090, eff. Oct. 3, 1970; 42 U.S.C.A. § 433.) That agency has no interest in promoting or protecting a particular industry (*i.e.*, the nuclear power industry), and is able to establish and enforce regulations from an interdisciplinary base so as to insure the best possible protection of our environment. No other federal agency meets this qualification.

The Atomic Energy Act, as amended, has several purposes. The development of the nuclear industry remains the most important. Although the development and research functions have been separated from the regulatory function by the forming of The Energy Research and Development Administration (ERDA) and the NRC, the NRC still has an interest in the continued use of nuclear power, that being the subject of its regulatory authority. This interest of the NRC is well demonstrated by language in *Northern States*

Power Company v. State of Minnesota, supra, 447 F.2d 1143 (8th Cir. 1971) *aff'd* 405 U.S. 1035 (1972):

> "Thus, through direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards. . . . Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceivably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power." 447 F.2d 1153, 1154.

Now that Congress, through the FWPCA, has expressed its unqualified intention to clean up the nation's water, new environmental considerations must be weighed by the agency setting pollution standards and that agency must be able to view objectively the needs for nuclear energy and a clean environment. Compromise of health and safety in favor of nuclear growth is not tolerable in light of Congress' expressed intention to ultimately achieve zero water pollution. 33 U.S.C.A. § 1251(a).

2. *The EPA Has the Required Expertise to Regulate All Radioactive Effluents*

Section 2021(h) of the Atomic Energy Act requires the Administrator of the EPA to develop expertise in radiation matters.

> "The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for *all Federal agencies* in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. . . ." (Emphasis added).

Thus, by the terms of the AEA, the EPA Administrator is required to play a major role in setting radiation standards and to guide the NRC (a federal agency) in establishing the same.

This cooperation between the EPA and NRC is further mandated by terms of the FWPCA (*e.g.*, 33 U.S.C.A. §§ 1252, 1254, 1314, 1317, 1361). The Administrator of the EPA is required to consult with appropriate federal agencies in setting pollution standards, conducting research on pollution technology and in other related areas. In addition, the Administrator may seek the assistance of other agencies in carrying out the purposes of the Act. 33 U.S.C.A. § 1361(h).

Petitioners agree that close cooperation is required between the AEC (NRC) and the EPA (Brief for the Petitioners 74-1270, p. 53). The problem appears to be in setting the point at which the authority of the two agencies is divided. Amici curiae suggest that the division logically must be correlated to the purposes of the two Acts involved. Since the Atomic Energy Act deals primarily with the possession and *use* of radioactive materials, its regulation is logically in those areas. The Federal Water Pollution Control Act deals with pollution of waterways. In the context of this case, the concern is radioactive waste materials (effluents of byproduct, source, and special nuclear materials)—an aspect arising *after* the use of nuclear materials. The EPA is charged with regulating such effluents.

Amici curiae in support of petitioners claim that ". . . regulation of liquid nuclear wastes from nuclear power plants is inextricably intertwined with [NRC's] regulation of other radiological aspects of such plants." (Brief Amici Curiae 74-1270, p. 21.) While this statement may be true, it misses the crux of the issue. It is exactly that dependent relationship between the construction and operation of nuclear power plants and the emission of liquid nuclear wastes which leads to the conclusion that proper consideration to environmental protection can best be made by the EPA (see Argument II B). This is not to say that nuclear growth should or must cease; rather, strong regulatory control must be given to the environmental effects of this growth. Such objective control is best attained through an agency with expertise in the environmental field. The EPA, specifically formed to provide such expertise and expressly required by the AEA to acquire expertise in radiation matters, is the proper agency to determine allowable nuclear effluent levels consistent with public health and environmental quality.

D. Regulation of Nuclear Effluents by the EPA Will Not Result in Unnecessary Duplication or Inefficient Regulation

The authority over radioactive materials discharges that is given to the EPA by the FWPCA is not inconsistent with the continued authority of the NRC to enforce radioactive materials discharge restrictions through its licensing program. This can best be illustrated with respect to the transportation of nuclear materials. Under its power to impose conditions to protect health and safety in conjunction with NRC licenses, the Commission prescribes standards for the packaging and transportation of radioactive materials, including fuel for nuclear reactors. The transportation

of these same materials is regulated, in addition, with regard to the same radiation hazards, by other federal agencies under the Transportation of Explosives Act, 18 U.S.C. §§ 831-835 (rail and highway); under the Dangerous Cargo Act, 46 U.S.C. § 170 (water); and under the Federal Aviation Act, 49 U.S.C. §§ 1421, 1430, and 1472(h), as well as by the Postal Service. The NRC (and its predecessor, the AEC) has never denied the fact that, while NRC plays a significant role in nuclear materials transportation regulation with regard to radiation hazards, the preeminent regulatory power over such transportation with regard to such hazards is vested in these other federal agencies, primarily the Department of Transportation (DOT). A reactor operator cannot secure a license from the NRC without conforming to NRC's radiation hazard control requirements concerning nuclear fuel transportation; but DOT regulations designed to control those same hazards in nuclear fuel transportation must be complied with as well. NRC's own regulations acknowledge this multiplicity of control over radiation hazards in transportation. 10 C.F.R. § 71.1(b).

The transportation example serves to make the point not only that the Atomic Energy Act is not necessarily exclusive of concurrent regulation by other federal agencies, but also that the jurisdiction of those other agencies over matters which are at the same time within the scope of the NRC is to be ascertained by reference to other appropriate statutes and not by reference to the Atomic Energy Act. Moreover, the cases indicate that where those other applicable federal statutes countenance regulation by the states, state regulations as well as the regulations of one or more other federal agency may apply concurrently with NRC (AEC) requirements concerning radioactive materials transportation. *See*

Western Interstate Nuclear Board, Report of Committee on Transportation of Radioactive Materials (1974).

Such a scheme of overlapping jurisdiction does not necessarily result in needless duplication of regulatory effort; rather, it makes possible collaboration and cooperative application of expertise while insuring greater opportunity for safeguarding public safety. A provision of the FWPCA, 33 U.S.C.A. § 1251(f), states that

> "to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."

This, however, is not a disavowal of overlapping or concurrent jurisdiction; rather, it is a directive that when agency jurisdictions do overlap the procedures worked out by the agencies should aim at efficiency. An example of agency cooperation in an area of concurrent jurisdiction is the Memorandum of Understanding dated March 22, 1973, 38 F. R. 8466, by which the AEC and DOT recognize the DOT's predominant authority over nuclear materials transportation but outline cooperative measures for meshing DOT action with concurrent controls of the AEC.

Another example of dual regulation specifically contemplated by the FWPCA concerns standards of performance for "steam electric powerplants." Steam electric powerplants in which the heat from nuclear reactions rather than the heat from fossil-fuel combustion is used to manufacture the steam, are of course licensed by the NRC under the Atomic Energy Act, and NRC demands certain performance standards as a condition

to such licensure. Yet the FWPCA specifically requires EPA nonetheless to impose "national standards of performance" upon "steam electric powerplants." Still another example of dual regulation specifically contemplated by the FWPCA (although not having to do with radioactive pollutants) occurs in 33 U.S.C. section 1342 (g) (Supp. 1973) providing for concurrent EPA and DOT regulation of pollutant discharges from vessels or other floating craft.

Plainly, therefore, there is nothing in the FWPCA to repel the conclusion that derives from the plain meaning of the words of the statute. Although the NRC may have power to limit radioactive materials discharges incident to its authority to regulate construction and operation of nuclear facilities, the FWPCA gives independent regulatory power over such discharges to the EPA. If there is a possibility of inefficiency in this congressionally chosen scheme, the solution is administrative accommodation, as for example by AEC enforcing through its licensing proceedings the more stringent regulations that other agencies having jurisdiction might impose. The solution is *not* to ignore the important responsibility conferred by Congress upon EPA for the public benefit.

E. The Northern States Case Does Not Preclude EPA Regulation of Byproduct, Source, and Special Nuclear Materials

The issue in controversy in *Northern States Power Company v. State of Minnesota, supra,* 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972), was:

> ". . . whether the United States Government has the sole authority under the doctrine of pre-emption to regulate radioactive waste releases from nuclear power plants to the exclusion of the states." *Id.* at 1144.

As has been discussed by petitioners and by amici curiae in support of petitioners, the court found that the states were pre-empted from setting effluent emission standards.

Regardless of the correctness of the court's finding with regard to state regulation, the *Northern States* case does not hold that the EPA may not regulate radioactive water pollution. The decision refers to a need for uniform control and federal regulation; the EPA would provide both. Moreover, the Federal Water Pollution Control Act, being a later expression of legislative intent, must control over the AEA and the *Northern States* decision as to both EPA and state regulation of nuclear effluents. *Lietz v. Flemming*, 264 F.2d 311 (6th Cir. 1959); *Ely v. Velde, supra*, 321 F.Supp. 1088 (E.D. Va. 1971).

The FWPCA established a *federal* program to achieve a *national* goal (33 U.S.C.A. § 1251). Throughout the Act, procedures are created whereby the states may participate in this program, but such participation is conditioned upon the approval of and continued surveillance by the Administrator of the EPA. For example, section 1313 deals with state requirements for meeting water quality standards. All state programs must be approved by the Administrator, and if a state fails to submit a satisfactory program, the Administrator has authority to establish regulations for the state. Additionally, section 1361(f) provides for the detailing of EPA personnel to the states in order to help carry out the purposes of the Act; thus, any possible lack of state expertise in this area is resolved by federal assistance.

Conclusion.

The Atomic Energy Act and the Federal Water Pollution Control Act were enacted for different purposes. Regulation of *all* radioactive effluents into navigable waters is mandated by the FWPCA. The EPA, as the administrative agency of the FWPCA, must impose and enforce effluent standards in this area and coordinate state programs for the achievement of this goal. The Nuclear Regulatory Commission must cooperate with the EPA in this move to protect our environment. Simultaneously, the NRC will be achieving part of its statutory duty to protect public health and safety. Meanwhile, the NRC can focus upon its primary duty, that of regulating atomic materials throughout the period when they are *possessed, controlled,* and *used.*

Thus, the NRC regulates nuclear materials in their operational, or functional, periods. The EPA, under the FWPCA, regulates radioactive materials which are no longer being used, but rather, are being discharged into our national waterways. A clear holding by this court that EPA has regulatory authority over such nuclear effluents will afford the best possible protection to the national environment and public health and safety.

Respectfully submitted,

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